



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 18/2013

In the matter between:

THE STATE

and

HOSIAN HENDIMBI

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1671/2012)

Neutral citation: *The State v Hendimbi* (CR 18/2013) [2013] NAHCMD 91 (09 April 2013)

Coram: VAN NIEKERK J *et* UEITELE J

Delivered: 10 APRIL 2013

Flynote: Criminal procedure – Section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 – Accused convicted of being an accessory after the fact to housebreaking with intent to steal and the crime of theft on his plea of guilty – When the court questioned - Material elements of the crime not admitted.

Criminal law: General principles of liability - Accessory after the fact - What constitutes - Failure to report crime - Mere failure per se to report crime not unlawful and not resulting in conviction of being accessory after the fact.

Summary: The accused was convicted of being an accessory of after the fact on his plea of guilty to a charge of housebreaking with intent to steal and the crime of theft.

During the court's questioning pursuant to the provisions of s 112 (1) (b) of Act 51 of 1977 the accused explained that he found items placed in front of a house by people who ran away when they saw him approaching. He further explained that he took the items and wanted to take them for himself. As he was walking home people in a taxi approached him and claimed that the items were theirs, he asked them to bring the owner for the owner to identify the items. The people in the taxi followed him as he walked home. He later decided to abandon the items and go home.

Held that the conviction of the accused of being an accessory after the fact to housebreaking with intent to steal and the crime of theft is wrong and is set aside.

Held further that the answers which the accused gave to the magistrate in pursuance to the questioning in terms of section 112 (1) (b) of Act 51 of 1977 reveal that the accused appropriated the items (although he later abandoned the items) with the intention to permanently deprive the owners of those items. That the elements of the crime of theft have been proven.

ORDER

- 1 The conviction of being an accessory after the fact to housebreaking with intent to steal and the crime of theft is set aside and substituted with a conviction of theft.
2. The sentence is confirmed but the condition of suspension is deleted and the following condition is substituted therefor:
"on condition that the accused is not convicted of theft committed during the period of suspension".

JUDGMENT

UEITELE J (VAN NIEKERK J concurring):

[1] The accused was convicted in the Magistrate's Court, Swakopmund of being an accessory after the fact on a plea of guilty to a charge of housebreaking with

intent to steal and the crime of theft and sentenced to 16 months' imprisonment, wholly suspended for a period of five years on condition of good conduct.

[2] The accused was questioned pursuant to the provisions of s 112 (1)(b) of the Criminal Procedure Act, 1977. In respect of the questioning the following appears from the record of proceedings:

“Q: On 25/09/2011 were you at or near House 1448 Mondesa, Swakopmund in the District of Swakopmund?

A: I did not go to the house itself but was at the gate of the yard.

Q: Tell the court in your own words what happened that lead to your arrest and appearance before court today?

A: It was last year September and I was coming from Club at night and it was between 01:00 – 02h00 and I found a guy standing at the gate of the yard and before I could reach him I saw another one coming out of the yard. As I was getting close the one who was standing at gate, he started to move away and he whistled for the other one. The other one who came was coming out and I could see he was carrying something. I saw he seemed to be carrying something and I saw he bend down and place items on ground and he proceeded and ran away. When I saw this I went closer and started calling. I got close and saw there was plastic bag, a suitcase and a backpack. I then took these items. I walked small distance and then there was taxi and two gentlemen got off taxi and said they want to take look at the items as there was a guy who reside with them that stole the goods. I also realize the other guys who ran away, one was light in complexion, and the one enquiring about goods looked different from one's that ran away. When they said they want to look at the items I told them to go get the owner of the goods to identify it. They followed me as I walked home. Later I decided if they said the items are theirs I will place the items on the ground and go home. After two or three days when I came back home I heard there was police officer looking for me.

Q: What did you think when these guys ran away and you saw these items on the ground.

A: I thought there might be a place where they took it from.

Q: You thought it was stolen?

A: I thought it was stolen.

Q: Why did you take the items?

- A: It was items I also liked and that is why I took it for myself.
- Q: So you did not report this to the police?
- A: I did not.
- Q: Would you dispute that these items were indeed stolen during course of a housebreaking?
- A: I cannot dispute that it is possible.
- Q: You did not enter the house?
- A: I did not.
- Q: Do you know to whom did the items belong?
- A: I do not know.
- Q: If the charge sheet alleges that the items belonged to a Mr Hannes Scott and that it was stolen from his house will you place it in dispute?
- A: I will not.
- Q: What was in the bag.
- A: I did not have a look to see what was in there as after I took it. It was not long before the other people approached me.
- Q: Do you know the value of the items you had in your possession?
- A: I do not know. I will not place the value in charge sheet in dispute.
- Q: Did you have any rights or permission to take these items without reporting said matter to police?
- A: I had no right.
- ...
- Court: Court is convinced that the accused admits the elements of accessory after the fact to housebreaking with the intent to steal and of the crime of theft is convicted accordingly.'

[3] When the matter came before me on review I directed the following query to the magistrate:

'The offence of accessory after the fact is defined as follows: "A person is an accessory after the fact to the commission of the crime if, after the completion of a crime he unlawfully and intentionally engages in conduct intended to enable the perpetrator or accomplice in the crime to evade liability for his crime, or to facilitate such person's evasion of liability". See *R v Munango & Another* 1956 (1) SA 438 at 439. On what basis was the accused then convicted as an accessory after the fact?'

[4] The learned magistrate replied to the query in the following terms:

“...I interpreted the fact that the accused failed to report the crime and just remained inactive in that regard as an association that takes the form of helping the perpetrator evading justice. With the benefit of having read the relevant authorities on this point I concede that my interpretation was too wide and that the accused should only have been convicted of theft.”

[5] I am of the view that the magistrate correctly conceded that the conviction of the accused of being an accessory after the fact to housebreaking with intent to steal and the crime of theft is wrong. I say so for the following reasons. Snyman¹ argue that:

“A person is an accessory after the fact to the commission of crime if, after the completion of the crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator or accomplice in the crime to evade liability for his crime or to facilitate such other a person’s liability.”

[6] From the excerpts quoted above in paragraph 2, it is clear that the accused took the items with the intention of taking the items for himself, he did not take the items with the intention to assist the persons who broke into the house and stole the items to escape conviction. The conviction of being an accessory after the fact to housebreaking with intent to steal and the crime of theft must thus be set aside.

[7] The magistrate has urged me to rather substitute the conviction of being an accessory after the fact to housebreaking with intent to steal and the crime of theft with a conviction of the crime of theft. She said the following:

“...The accused knew the items were stolen and decided that he wanted the items for himself and stole it from the thieves. He had no right or permission to take the said items.

¹Snyman C R *Criminal Law* 4th Edition, Butterworths page 275 Also see the South African case of *S v Phallo and Others 1999 (2) SACR 558 (SCA)* where the court said ‘...To sustain a conviction of being an accessory after the fact in the present case the prosecution must prove that the accused performed some act or acts intended to assist the principal offender to escape conviction.’

I realized that theft is a continuous offence and that is why the accused was convicted of accessory after the fact to housebreaking with the intent to steal **and the crime of theft**. If it so pleases the Honourable Reviewing Judge he is requested to substituted the conviction with theft only and that the sentence i.e. the suspended sentence remains in place but that conditions be substituted to read ... "on condition that the accused is not convicted of theft committed during the period of suspension".

[8] I am satisfied that the accused took control of the goods for the purpose of appropriating them for himself and to permanently deprive the thieves of the goods. When he did so, the crime of theft was complete. The intervention by the persons who followed him, which led to the abandonment of the goods, does not undo the theft of the goods and does not absolve the accused from criminal liability. I therefore agree with the magistrate that the answers given by the accused person established the charge of theft beyond a reasonable doubt.

[9] In the result I make the following order.

1. The conviction of being an accessory after the fact to housebreaking with intent to steal and the crime of theft is set aside and substituted with a conviction of theft.
2. The sentence is confirmed but the condition of suspension is deleted and the following condition is substituted therefor:
"on condition that the accused is not convicted of theft committed during the period of suspension".

SFI Ueitele
Judge

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I agree

K van Niekerk

Judge